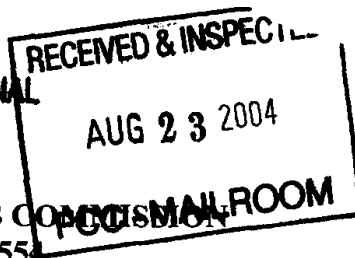


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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )

BellSouth Emergency Petition for )  
Declaratory Rule and Preemption of )  
State Action )

WC Docket No. 04-245

**REPLY COMMENTS OF THE PACE COALITION, COMPETITIVE CARRIERS OF  
THE SOUTH AND COMPTTEL/ASCENT**

The Promoting Active Competition Everywhere ("PACE") Coalition, Competitive Carriers of the South ("CompSouth"), and CompTel/ASCENT (collectively, "Joint Commenters") through their undersigned counsel, respectfully submit these reply comments in the above-captioned proceeding. Although the Bell Operating Companies ("BOCs") uniformly argue that the Federal Communications Commission ("Commission") should preempt the Tennessee Regulatory Authority ("TRA") and other states from establishing rates for network elements made available under section 271 of the Communications Act of 1934, as amended (the "Act"), the BOCs have not submitted any support – nor can they – for their proposition that the states do not have the authority to set rates for these network elements. To the contrary, the comments in the proceeding overwhelmingly demonstrate that, under the plain language of the Act, the states – including the TRA – have the authority to set rates for network elements made available under section 271 of the Act by resolving open issues in an arbitration proceeding.

Furthermore, as several commenters have pointed out, putting aside the explicit language of the Act, it would be bad public policy for the Commission to eject the states from their role setting rates for section 271 network elements. Preempting the TRA's authority to set

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rates through the arbitration process would frustrate not only the primary purpose of the Act – opening markets to competition – but also any commercial negotiations that otherwise might occur between carriers.

## **I. STATE COMMISSIONS HAVE THE AUTHORITY TO SET RATES FOR SECTION 271 NETWORK ELEMENTS**

There is broad support among non-BOC commenters that the TRA and other state commissions have the authority to set rates for section 271 network elements.<sup>1</sup> Nothing in the Act or in the Commission’s rules and orders limits a state’s role to a consultative one in the section 271 application process, as the BOCs argue. To the contrary, a state commission’s role continues even after a BOC has received section 271 authority.<sup>2</sup> Indeed, under the plain language of the Act, state commissions have the authority through the arbitration process to set rates for section 271 network elements that are not required to be made available under section 251. Indeed, recognizing the states’ authority to set rates in accordance with the just and reasonable pricing standard set forth in sections 201 and 202 of the Act is consistent with federal policy. Moreover, preemption is inappropriate in this case, and only would serve to frustrate CLEC efforts to negotiate in good faith with ILECs.

### **A. State Commissions Have the Authority to Set Rates for Section 271 Network Elements Under the Plain Language of the Act**

The Joint Commenters support the comments filed in this proceeding by AT&T among others, which uniformly demonstrate that, under the plain language of the Act, the TRA has the authority to set rates for network elements made available under section 271 in the

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<sup>1</sup> See ALTS Comments at 2; AT&T Comments at 13-16; Cbeyond Comments at 5-6; Mpower Comments at 4, 8; US LEC Comments at 3; Z-Tel Comments at 10; NARUC Comments at 5; Tennessee Regulatory Authority Comments at 12-14.

<sup>2</sup> See, e.g. ALTS Comments at 4, 7-8 (stating that state commissions are “an important partner to the FCC in ensuring ongoing BOC compliance with the competitive checklist.”).

context of an arbitration proceeding.<sup>3</sup> As the Joint Commenters stated in their initial comments, and as the comments of other parties show, BOCs must offer each checklist item either through an interconnection agreement or an SGAT.<sup>4</sup> These interconnection agreements and SGATs, in turn, must be approved by state commissions.

In addition, under the Act, states are tasked with resolving all open issues in an arbitration proceeding.<sup>5</sup> As the TRA stated, this is precisely what it did in this case: the TRA resolved an open issue in an arbitration proceeding.<sup>6</sup> Accordingly, the TRA acted within its authority in setting a rate for unbundled local switching made available under section 271 of the Act, and it is not appropriate for the Commission to preempt the TRA – or any other state – acting within such lawful authority.

**B. Permitting the State Commissions To Determine Whether Section 271 Network Elements are Priced in Accordance with the Just and Reasonable Pricing Standard is Consistent with Federal Policy**

There is simply no merit to SBC's argument that allowing the TRA to set rates would somehow thwart a "federal regime established by the Commission."<sup>7</sup> As the Joint Commenters stated in their opposition to BellSouth's petition, and as stated above, in the Act, Congress did not vest exclusive jurisdiction in the Commission to establish rates for network elements made available under section 271 of the Act. Instead, Congress explicitly provided states with the authority – and the responsibility – under section 252 to arbitrate and approve

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<sup>3</sup> See, e.g., AT&T Comments at 3 (stating that under the Act, the state commission is required to resolve any open issues in an arbitration proceeding); Cbeyond Comments at 6.

<sup>4</sup> Joint Commenters Comments at 5; *see also* AT&T Comments at 12-13.

<sup>5</sup> See AT&T Comments at 14-15; Joint Commenters Comments at 5-7; TRA Comments at 10.

<sup>6</sup> TRA Comments at 10-12.

<sup>7</sup> SBC Comments at 7.

rates for these network elements.<sup>8</sup> In vesting the Commission with the authority to determine which network elements should be unbundled, Congress did not – as SBC suggests – provide the Commission with the exclusive jurisdiction to implement and enforce compliance with section 271 of the Act.

Acknowledging state authority to adjudicate rates for network elements in no way frustrates the goals of the Act or alters the Commission’s decision not to require unbundling of a particular network element.<sup>9</sup> Indeed, as AT&T states, a state commission setting prices for section 271 network elements will not “thwart or frustrate” any federal interest under section 271.<sup>10</sup> In the *Triennial Review Order*, the Commission articulated a pricing standard – the just and reasonable standard set forth in sections 201 and 202 – that applies to network elements made available under section 271 of the Act. In doing so, the Commission identified the applicable pricing methodology for states to follow in evaluating a BOC’s rates for these network elements.

By evaluating whether a rate is just and reasonable and not unreasonably discriminatory, the states are furthering Congress’s goal of ensuring local exchange markets are opened to competition. The states are not, as the BOCs claim, in any way thwarting or otherwise affecting the Commission’s unbundling determination. The states simply are exercising their authority to evaluate whether the rates are just, reasonable, and nondiscriminatory in accordance with the pricing standards set forth in the *Triennial Review Order*. With regard to the TRA, in

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<sup>8</sup> See Joint Commenters Comments at 5-8. The Joint Commenters incorporate by reference their opposition to BellSouth’s petition and will not reiterate those arguments herein. See also Mpower Comments at 4 (stating that BellSouth’s argument that a state commission only has “consultative” authority is false and that the “only way for Section 271 unbundling to occur is by means of interconnection agreements that have been approved by state commissions under Section 252.”)

<sup>9</sup> See SBC Comments at 9.

<sup>10</sup> AT&T Comments at 2.

particular, the TRA, as BellSouth concedes, has committed to applying this pricing standard.<sup>11</sup> Accordingly, there is no basis to preempt the decision of the TRA, or any other state commission, that attempts to evaluate rates in accordance with the pricing standards set forth in the Act.<sup>12</sup>

**C. The Commission Would Establish Bad Public Policy if it Were to Preempt the States' Authority**

Even if the FCC had the legal basis to strip the states of their authority to establish rates for section 271 elements, the Joint Commenters strongly agree with Z-Tel that it would be bad public policy for the Commission to conclude it has exclusive authority to set rates for 271 network elements.<sup>13</sup> As Z-Tel explains, BellSouth repeatedly has challenged carrier attempts to have rate disputes heard before the Commission, such as in the context of a section 271 interLATA entry proceeding.<sup>14</sup> In reviewing BellSouth's applications for authority to provide in-region long distance service, the Commission agreed with BellSouth – and in doing so rejected the complaints of other carriers – that the state commission, not the FCC, should be the agency tasked with reviewing non-section 251(c)(3) rates, in the first instance. Now that BellSouth has obtained interLATA operating authority, however, it wants to strip the state commissions of any authority to review the reasonableness of its rates. As stated above, the Act explicitly provides states with authority to set rates for section 271 network elements. There is simply no lawful basis to strip the states of this authority.

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<sup>11</sup> BellSouth Petition at 2.

<sup>12</sup> Furthermore, the states are in the best position to evaluate the propriety of a BOC's rates. The Joint Commenters agree with Cbeyond that as a practical matter, the states should set rates for these network elements because the states are "familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties..."Cbeyond Comments at 9.

<sup>13</sup> Z-Tel Comments at 18-21.

<sup>14</sup> See Z-Tel Comments at 18-21.

#### **D. Allowing the States to Set Rates Will Promote Commercial Negotiations**

The Commission must reject BOC arguments that permitting the states to set rates somehow would impede commercial negotiations among carriers.<sup>15</sup> As the Joint Commenters stated in their opposition, and as confirmed by other commenters in this proceeding,<sup>16</sup> in response to the Commission's call for commercial negotiations, CLECs have attempted for months to negotiate in good faith with BellSouth and other BOCs, only to have their attempts stall at every step of the negotiation process. CLECs do not have any bargaining power in these negotiations, and the BOCs do not have any interest in engaging in the give-and-take characteristic of true commercial negotiations.<sup>17</sup>

Contrary to the BOCs' arguments, as AT&T states, preempting the state commissions from exercising their authority to arbitrate rates for section 271 network elements would further discourage BOCs from negotiating in good faith.<sup>18</sup> Indeed, the Joint Commenters agree with AT&T that, as the dominant providers of local services, BellSouth and the other BOCs do not have any incentives to negotiate reasonable rates for section 271 network elements that no longer are required to be made available under section 251 of the Act.<sup>19</sup>

Nor is there any merit to the BOCs' argument that commercial negotiations would be hampered if section 271 network elements were subject to diverging state commission regulation. States will apply the same pricing standard across the board – i.e., the just and reasonable pricing standard – in evaluating whether a particular carrier's rate complies with the Act. By requiring rates to be consistent with the just and reasonable pricing standard, the

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<sup>15</sup> See Verizon Comments at

<sup>16</sup> See AT&T Comments at 19.

<sup>17</sup> Joint Commenters Comments at 14.

<sup>18</sup> AT&T Comments at 19.

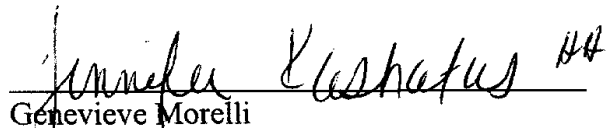
<sup>19</sup> AT&T Comments at 19.

Commission did not require that the rates be identical among all states or even among all states within a BOC's region.

## II. CONCLUSION

For the foregoing reasons, the Commission should reject BellSouth's petition in its entirety.

Respectfully submitted,

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